Low Soo Song v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–57 OF 2007(P)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), NIK HASHIM AND HASHIM YUSOFF FCJJ
19 FEBRUARY 2009

Criminal Law — Arms offences — Discharging firearm in commission of robbery — Whether evidence adduced to prove that robbery was committed by appellant and that at time of committing robbery appellant discharged firearm — Firearms (Increased Penalties) Act 1971 s 3

Criminal Law — Penal Code — s 34 — Common intention — Whether prosecution's failure to invoke s 34 of the Penal Code in charge meant that appellant was not equally liable for robbery

On 7 March 2001 the appellant and another ('the other person') had visited a house in search of the man of the house but had been notified by his wife ('the housewife') that he was not in. When they called at the house a second time on the same day the housewife was at the gate of the house. This time the appellant had approached the housewife and held her shoulder with one hand while he pointed a pistol at her with the other hand and ordered her not to shout. While she was held at gunpoint the other person had snatched away her gold chain and bracelet and a bunch of keys from her. The housewife was then forced into the house and when she fell, the appellant had sat on her whilst the other person ransacked the house. A moment later the housewife's daughter emerged from her room and was shot by the appellant. Ordering the housewife not to shout the appellant and the other person had both then left the scene. On 14 October 2001, the appellant was arrested in Thailand and brought back to Malaysia. He was thereafter charged under s 3 of the Firearms (Increased Penalties) Act 1971 ('the Act') for discharging a firearm in the commission of a scheduled offence of robbery. At the trial before the High Court the appellant's defence was a mere denial. Consequently he was convicted and sentence to death but appealed against his conviction and sentence. The Court of Appeal dismissed the appeal and ruled, inter alia, that since the evidence showed that it was the appellant who had held the pistol while his accomplice had committed the robbery and that it was the appellant who had discharged the firearm, the appellant's guilt had been established. This was the appellant's appeal against that decision. The appellant's appeal

A before this court was substantially on the issue that the courts below had erred in law when they linked the act of the robbery to the appellant when he had not committed the robbery, particularly as he was not charged for the offence in furtherance of a common intention under s 34 of the Penal Code ('Code') with another person who was and is still at large. The appellant submitted
B that it was for the prosecution to prove that it was the appellant who had committed the act of robbery and had discharged the firearm whilst committing the offence but that from the evidence there was nothing to suggest that the appellant had taken anything from the housewife or from the house.
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Held, allowing the appeal but substituting the conviction for the offence of voluntarily causing grievous hurt by a dangerous weapon under s 326 of the
D Code and sentencing the appellant to 18 years imprisonment from the date of his arrest:

(1) In the present case it was important for the prosecution to frame the charge with reference to s 34 of the Code. Section 34 is intended to make a person liable for the action of an offence not committed by him
E but by another person with whom he shared the common intention. On the facts of the instant case, it was the other person and not the appellant who committed the robbery. Therefore by invoking s 34, the appellant would have been equally liable for the act of robbery in the same manner as if the act were done by him alone, notwithstanding it
F was the other person who actually committed the offence. However, because the prosecution did not invoke s 34 of the Code it was incumbent upon them to prove that the appellant did commit the robbery and not the other person but from the evidence it was not possible to prove so (see para 15).
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(2) Further, the act of robbing the housewife of her gold jewellery was committed and completed outside the house during which time no firearm was discharged by the appellant. The appellant only discharged the firearm inside the house and was charged alone for discharging a
H firearm in the commission of the robbery. In the circumstances the prosecution had not proven that the appellant had discharged a firearm at the time of his committing the robbery and the conviction under s 3 of the Act could not be sustained (see paras 16 & 17).

I **[Bahasa Malaysia summary**

Pada 7 Mac 2001, perayu dan seorang lagi ('seorang yang lain') mendatangi sebuah rumah untuk mencari seorang lelaki tetapi telah diberitahu oleh isterinya ('suri rumah tersebut') bahawa dia tiada di rumah. Apabila mereka

kembali ke rumah tersebut, pada hari yang sama, suri rumah tersebut berada di depan pintu pagar rumah itu. Kali ini, perayu merapati suri rumah tersebut dan memegang bahunya dengan satu tangan dan satu lagi tangannya mengacu pistol ke arah suri rumah itu sambil mengarahkannya supaya jangan menjerit. Ketika pistol diacukan kepadanya, seorang yang lain meragut rantai dan gelang emasnya dan juga segugus kunci daripada suri rumah tersebut. Suri rumah tersebut ditolak masuk kedalam rumahnya dan apabila dia jatuh, perayu duduk di atasnya sementara seorang yang lain menggeledah rumah tersebut. Seketika kemudian, anak perempuan suri rumah tersebut muncul keluar dari biliknya dan ditembak oleh perayu. Mengarahkan suri rumah tersebut tidak menjerit, perayu dan seorang yang lain meninggalkan tempat kejadian. Pada 14 Oktober 2001, perayu ditangkap di Thailand dan dihantar pulang ke Malaysia. Dia kemudiannya dipertuduhkan di bawah s 3 Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta tersebut') kerana melepaskan tembakan daripada sesuatu senjata api di dalam melakukan sesuatu kesalahan rompakan berjadual. Pada perbicaraan di Mahkamah Tinggi pembelaan perayu adalah penafian semata-mata. Akibatnya, dia disabit dan dihukum mati tetapi dia merayu terhadap sabitan dan hukumannya. Mahkamah Rayuan menolak rayuannya dan memutuskan, antara lain, memandangkan keterangan menunjukkan bahawa perayulah yang mengacu pistol sementara rakan subahatnya melakukan rompakan tersebut dan bahawa perayulah yang melepaskan tembakan, maka kesalahan perayu telah terbukti. Ini merupakan rayuan terhadap keputusan tersebut. Rayuan perayu di hadapan mahkamah ini sebahagian besarnya adalah berkenaan isu bahawa mahkamah rayuan sebelum ini telah salah dari segi undang-undang apabila mereka mengaitkan perlakuan merompak tersebut kepada perayu sedangkan dia tidak melakukan rompakan tersebut, terutamanya dia tidak dipertuduhkan bagi kesalahan mencapai niat yang sama di bawah s 34 Kanun Keseksaan ('Kanun tersebut') dengan seorang yang lain yang masih bebas. Perayu menyatakan bahawa pihak pendakwaan yang seharusnya perlu membuktikan bahawa perayu yang melakukan rompakan dan melepaskan tembakan ketika melakukan kesalahan tersebut. Tetapi daripada keterangan, didapati tiada satu pun yang boleh menunjukkan bahawa perayu ada mengambil apa-apa daripada suri rumah tersebut atau dari rumah tersebut.

Diputuskan, membenarkan rayuan tetapi menggantikan sabitan kepada kesalahan dengan sengaja mengakibatkan cedera parah dengan senjata berbahaya di bawah s 326 Kanun tersebut dan menghukum perayu dengan penjara selama 18 tahun bermula dari tarikh dia ditangkap:

(1) Dalam kes ini, adalah penting bagi pihak pendakwaan merangka pertuduhan dengan merujuk kepada s 34 Kanun tersebut. Seksyen 34 bertujuan untuk menjadikan seseorang itu bertanggungan terhadap tindakan bagi kesalahan yang tidak dilakukan olehnya tetapi dilakukan

oleh orang yang lain, yang mana niat melakukan kesalahan tersebut dikongsi bersama. Dalam fakta kes ini, seorang yang lain yang melakukan kesalahan tersebut dan bukannya perayu. Oleh itu, dengan menggunakan s 34, perayu tentunya akan bertanggungan bersama terhadap kelakuan merompak tersebut sama seperti jika kelakuan tersebut dilakukan oleh perayu sahaja, meskipun seorang yang lain yang melakukan kesalahan tersebut. Tetapi, oleh sebab pihak pendakwaan tidak mengguna pakai s 34 Kanun tersebut, maka adalah wajib bagi pihak pendakwaan membuktikan perayu melakukan kesalahan merompak tersebut dan bukannya seorang yang lain. Tetapi daripada keterangan yang ada, tidak mungkin dapat membuktikan sedemikian. (lihat perenggan 15).

(2) Selanjutnya, kelakuan merompak barang kemas suri rumah tersebut dilakukan dan dibuat di luar rumah di mana tiada tembakan dilepaskan oleh perayu. Perayu hanya melepaskan tembakan ketika berada di dalam rumah tersebut dan hanya dipertuduhkan dengan kesalahan melepaskan tembakan ketika melakukan rompakan. Dalam keadaan bilamana pihak pendakwaan gagal membuktikan bahawa perayu melepaskan tembakan semasa melakukan rompakan, maka sabitan di bawah s 3 Akta tersebut tidak dapat dipertahankan. (lihat perenggan 16 & 17).]

Notes

For cases on arms offences in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 20–21.

For cases on s 34 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1267–1287.

Cases referred to

Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)

Low Soo Song v PP [2008] 1 CLJ 433, CA (refd)

Ong Poh Cheng v PP [1998] 4 MLJ 8; [1998] 4 CLJ 1, CA

PP v Ong Poh Cheng [1996] 4 MLJ 279, HC (refd)

Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)

Legislation referred to

Criminal Procedure Code s 167

Firearms (Increased Penalties) Act 1971 s 3

Penal Code ss 34, 326

Appeal from: Criminal Appeal No P-05–01 of 2004 (Court of Appeal, Putrajaya)

Amer Hamzah Arshad (Zain & Co) for the appellant.
Nurulhuda Nuraini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nik Hashim FCJ:

BACKGROUND

[1] The appellant was convicted and sentenced to death by the High Court for discharging a firearm in the commission of a scheduled offence of robbery on 7 March 2001 at 8.30am at a house No 6161 Jalan Dua Lahar Bubu, Bertam, Kepala Batas, Pulau Pinang in contravention of s 3 of the Firearms (Increased Penalties) Act 1971 ('the Act'). The charge on which the appellant was convicted was as follows:

> Bahawa kamu pada 7 Mac 2001, jam lebih kurang 8.30 pagi, di No. 6161, Jalan Dua Lahar Bubu, Bertam Estate, Kepala Batas, dalam daerah Seberang Perai Utara, dalam Negeri Pulau Pinang telah melakukan rompakan di rumah berkenaan iaitu satu kesalahan berjadual, dan semasa melakukan rompakan tersebut kamu telah melepaskan tembakan dari suatu senjata api ke arah seorang perempuan Cina bernama Ooi Hua Siew K/P: 790906–07–5316 dengan niat hendak menyebabkan kematian atau kecederaan ke atas perempuan itu, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 3 Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) dan boleh dihukum di bawah seksyen yang sama Akta tersebut.

[2] The appellant's appeal against the conviction and sentence was dismissed by the Court of Appeal (Gopal Sri Ram JCA, Mohd Ghazali Yusoff JCA, Hasan Lah JCA), (see *Low Soo Song v Public Prosecutor* [2008] 1 CLJ 433). The appellant further appealed to us. On 4 November 2008 we unanimously allowed the appeal but substituted the conviction for the offence with that of voluntarily causing grievous hurt by a dangerous weapon under s 326 of the Penal Code ('the PC') and sentenced the appellant to 18 years imprisonment with effect from the date of his arrest.

[3] On 7 March 2001 at about 8.10am a housewife (PW3) heard a car honk at her house gate. PW3 looked from inside the house and saw two persons wearing spectacles and caps. One of them removed his glasses and gave his name as Ah Beh and stated that he was looking for her husband. Ah Beh was known to PW3. On being told that her husband had gone out the two left. After they had left, PW3 then proceeded to meet her husband at a factory across the road. PW3 told her husband of the visit by the two men, one of whom was the appellant. She then went home. As she reached her gate she saw the appellant together with another man walking towards her and saying something which she did not understand. The appellant then held her

A shoulder with one hand and pointed a pistol at her with the other and ordered her not to shout. He also told her that it was a real pistol and asked her to call her daughter (PW4) to open the door.

B [4] At that moment, she felt weak and sat by the roadside outside the gate. The appellant's friend snatched away her gold chain and bracelet and also took the bunch of keys she had tucked to her waist. Later, she was forced into the house. She then fell onto the floor of the house near the dining area. Then the appellant sat on her whilst the other person ransacked the house.

C [5] A moment later, PW4 emerged from her room. PW3 realised that the appellant also saw PW4 and that was when she heard a gunshot, and heard PW4's shout in pain, and at that moment, the man who was ransacking the room came out and dragged PW4 to PW3's bedroom. With the permission of the appellant, PW3 went to her bedroom and saw PW4 in her bathroom.
D As soon as she entered the bathroom, the appellant ordered her not to shout and soon thereafter both of them left the scene. The appellant was arrested in Thailand and brought back to Malaysia on 14 October 2001. The other person is still at large.

E [6] At the trial before the High Court, the appellant gave evidence on oath. He denied that on the day and time in question, he had been to the PW3's house. He also denied knowing her. His defence was a mere denial. Consequently, the learned High Court judge found the appellant guilty and convicted him on the offence charged.
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[7] In dismissing the appeal the Court of Appeal ruled, amongst other things, that it was the appellant who held the pistol; it was his accomplice who committed the robbery and it was the appellant who discharged the
G firearm, and agreed with the trial judge that there was abundant evidence to establish the appellant's guilt, and held that his conviction was entirely safe.

APPEAL TO THIS COURT

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[8] Before us, learned counsel for the appellant argued substantially on one issue that the courts below had erred in law when they linked the act of the robbery (which was not committed by the appellant) to the appellant, notwithstanding that the appellant was not charged for the offence in
I furtherance of a common intention under s 34 of the PC, and therefore, the appellant's conviction was against the weight of the evidence.

[9] Having heard the submissions advanced and read the authorities submitted by both parties, we found merit in the appeal.

[10] Before we give our reasons, it is perhaps necessary to be mindful of s 3 of the Act which states as follows:

> Any person who *at the time of his committing* or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

(Emphasis added.)

[11] And 'robbery' is one of the scheduled offences enumerated in the Schedule to the Act.

[12] What the prosecution had to prove for the offence under s 3 of the Act against the appellant were:

(i) that there was a robbery committed by the appellant;

(ii) that the appellant at the time of his committing the robbery discharged a firearm; and

(iii) that the appellant intended to cause death or hurt to some person.

Be it noted that even if no hurt was caused by the discharge of the firearm, it is of no consequence to the offence.

[13] The wordings of s 3 of the Act, in particular, 'any person who at the time of his committing ... a scheduled offence discharges a firearm' clearly means that the prosecution must prove that it was the appellant who committed the act of robbery and had discharged a firearm whilst committing the offence. Jeffrey Tan JC (as he then was) in *Public Prosecutor v Ong Poh Cheng* [1996] 4 MLJ 279 had the opportunity to interpret the phrase '*at the time of his committing*' at p 291:

> That s 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must therefore be narrowly construed. The natural meaning of the words '*at the time of his committing* the offence' emphasises the time of the commission of the offence and specifies the discharge of a firearm before the completion of a scheduled offence. The choice in the language — the present participle — was deliberate and reflected the legislature's intention to have severely punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence.

(Emphasis added.)

In our judgment, the learned judicial commissioner's interpretation of the phrase is correct. It may be noted that *Ong Poh Cheng*'s case went on appeal to the Court of Appeal and the High Court's decision was upheld (see *Ong Poh Cheng v Public Prosecutor* [1998] 4 MLJ 8; [1998] 4 CLJ 1) and a further

A appeal to the Federal Court (Wan Adnan CJ (Malaya), Dr Zakaria Yatim FCJ, Chan Nyarn Hoi JCA) was dismissed vide *Mahkamah Persekutuan Rayuan Jenayah* No 05–9–1998 (P) dated 24 November 1998. However, there was no written judgment of the Federal Court.

B **[14]** It is worthy of note that the appellant was never charged for committing the offence in furtherance of a common intention under s 34 of the PC with another person who was and is still at large. In *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043, the Court of Appeal (Richard Malanjum JCA, Augustine Paul JCA, Hashim Yusoff JCA C (as they were then)) reiterated the principle of s 34 of the PC set forth in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 where Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, said at pp 50–51:

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> [28] To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:

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> *Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention*. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the F common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is G that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)

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> [29] In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

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> Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was

done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[15] It is therefore important in our case for the prosecution to frame the charge with reference to s 34 of the PC. The provision is intended to make a person liable for the action of an offence not committed by him but by another person with whom he shared the common intention. By invoking s 34, it means that the appellant was equally liable for the act of robbery in the same manner as if the act were done by him alone, notwithstanding that it was the other person who actually committed the offence.

[16] But in the present case, the appellant was charged alone for discharging a firearm in the commission of the robbery. On the facts, it was the other person and not the appellant who committed the robbery. He had snatched away PW3's gold chain and bracelet when she was sitting by the roadside outside the gate of her house. The offence of robbery was committed and completed outside the house during which time no firearm was discharged by the appellant. The appellant shot at PW4 whilst they were in the house. Since the prosecution did not invoke s 34 of the PC, it is incumbent upon the prosecution to prove that the appellant did commit the act of robbery and not the other person. From the evidence, there was nothing to suggest that the appellant had taken anything from PW3 or in the house. In fact the finding of fact by the High Court, which was subsequently affirmed by the Court of Appeal, vis-a-vis the act of robbery, clearly showed that the said act of robbery was not committed by the appellant. Hence, the first two vital ingredients of the offence, that the robbery was committed by the appellant and that the appellant at the time of his committing the robbery discharged a firearm, were not proved against the appellant. The charge against the appellant could not stand. We agreed with the appellant that the conviction was against the weight of the evidence.

[17] Therefore, the conviction under s 3 of the Act could not be sustained as the prosecution had failed to prove that the appellant had committed the robbery when he discharged the firearm. Accordingly, we allowed the appeal and set aside the conviction and sentence imposed. However, we found there was ample evidence on record to show that it was the appellant who voluntarily caused hurt to PW4 by means of a firearm, an instrument for shooting. The injury suffered by PW4 was described by the orthopaedic

surgeon (PW5) as 'a through and through gunshot wound in the upper part of her thigh'. And this hurt clearly endangered her life. By virtue of s 167 of the Criminal Procedure Code, we found the appellant guilty and convicted him under s 326 of the PC for voluntarily causing grievous hurt to PW4. After hearing his mitigation, we sentenced him to 18 years imprisonment to run from the date of his arrest.

Appeal allowed.

Reported by K Nesan